

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILLIAM R. BURKETT, JR.,)	
)	
Plaintiff,)	Case No. CV05-1856-RSM
)	
v.)	
)	
JO ANNE B. BARNHART, Commissioner)	REPORT AND RECOMMENDATION
of Social Security Administration,)	
)	
Defendant.)	
_____)	

I. INTRODUCTION AND SUMMARY CONCLUSION

Plaintiff William R. Burkett, Jr. appeals a final decision of the Commissioner of the Social Security Administration (“Commissioner”) that denied his application for Disability Insurance Benefits (“DIB”) under Title II of the Social Security Act after a hearing before an administrative law judge (“ALJ”). Plaintiff also seeks an award of benefits on a Supplemental Security Income (“SSI”) application that has not yet been processed by the Commissioner and was not considered by the ALJ. For the reasons set forth below, I recommend that plaintiff’s SSI claim be dismissed for lack of subject matter jurisdiction. I further recommend that the decision of the Commissioner regarding plaintiff’s DIB application be reversed and that the case be remanded for further administrative proceedings, concurrent with plaintiff’s SSI claim.

II. FACTS AND PROCEDURAL HISTORY

Plaintiff is a 62-year-old man with a high school education. AR 132, 135. He worked

01 as an information officer and spokesman for the Washington State Patrol for more than
02 fifteen years. AR 127, 506. He has also intermittently performed work as a freelance writer
03 and editor. AR 143-47.

04 Beginning in the late 1980s plaintiff began to experience difficulty staying awake
05 during the day and his lengthy morning commute became difficult. AR 126, 505. In 1992,
06 plaintiff was diagnosed with sleep apnea and was prescribed a continuous positive airway
07 pressure ("CPAP") machine to alleviate the symptoms of his sleep apnea. AR 126, 505-06.
08 However, the CPAP frequently inflames his nasal allergies, which in turn, renders the device
09 ineffective. AR 506-08. Plaintiff's employer arranged for a flexible work schedule and other
10 accommodations for his irregular sleep patterns. *Id.* In 1993 however, new management did
11 away with these accommodations and plaintiff was required to be at work on time each
12 morning. AR 507. Plaintiff was unable to meet that expectation and he was terminated. AR
13 126, 507.

14 On May 18, 2000, plaintiff filed an application for DIB. AR 69-71. He alleged that he
15 had become disabled by September 30, 1993, due to sleep apnea complicated by an allergic
16 reaction triggered by the CPAP. AR 69, 126. He later amended his claimed onset date to
17 December 30, 1998, to account for earnings records that suggested he may have engaged in
18 substantial gainful activity after the 1993 date. AR 489-96. Plaintiff's application was denied
19 both initially and upon reconsideration. AR 41-51. On August 22, 2002, plaintiff requested an
20 administrative hearing before an ALJ. AR 52.

21 On October 17, 2000, while his DIB application was pending, plaintiff filed an
22 application for SSI. AR 152, 499-500. Although the application was submitted, the Social
23 Security Administration ("SSA") was unable to process it because it was incomplete and
24 unsigned. AR 483-84, 503. It is unclear whether the plaintiff corrected the deficiencies and
25 the Commissioner concedes that the application may have been lost. AR 154-56; Dkt. No. 22
26

01 at 4. In May of 2002, plaintiff contacted the office of U.S. Senator Patty Murray to assist him
02 with following up on his SSI application. AR 151-53. On May 30, 2002, plaintiff filed a
03 second application for SSI, but was denied because he did not financially qualify for benefits at
04 that time. AR 477. There is no indication that a timely administrative appeal of this decision
05 was ever filed.

06 On March 18, 2004, a hearing was held before an ALJ to review the denial of plaintiff's
07 DIB application. AR 485-545. At the time of the hearing, the ALJ had no record of the SSI
08 applications. AR 499-504. Plaintiff and his attorney had apparently expected that both the
09 DIB and his SSI applications would be considered by the ALJ. Dkt. No. 16 at 16, AR 499.
10 The hearing proceeded solely on the issue of determining disability for purposes of the DIB
11 application. AR 504.

12 On August 21, 2004, the ALJ issued a decision finding that plaintiff was not disabled
13 prior to December 31, 1998, his date last insured ("DLI"). AR 19-36. Although the ALJ
14 found that plaintiff suffered from severe physical impairments, namely obesity and sleep apnea,
15 she concluded that plaintiff was nonetheless able to perform his past relevant work. AR 35-36.
16 Proceeding pro se, plaintiff requested administrative review of the decision and submitted
17 additional materials. AR 8-18, 443-75. On August 20, 2005, the Appeals Council denied
18 plaintiff's request for review. AR 5-7. On November 18, 2005, plaintiff filed the present civil
19 action challenging the ALJ's August 21, 2004, decision. Dkt. No. 4.

20 III. JURISDICTION

21 The Court has jurisdiction to review a final decision made by the Commissioner. 42
22 U.S.C. § 405(g). "A final decision has two elements: (1) presentment of the claim to the
23 Commissioner, and (2) complete exhaustion of administrative remedies." *Kildare v. Saenz*,
24 325 F.3d 1078, 1082 (9th Cir. 2003), *quoting Johnson v. Shalala*, 2 F.3d 918, 921 (9th
25 Cir.1993). The presentment element is jurisdictional and must be satisfied as a prerequisite to
26

judicial review, whereas the exhaustion requirement may be waived by either the Court or the Commissioner.¹ *Johnson*, 2 F.3d at 921. The Court must dismiss for lack of subject matter jurisdiction a case where the Commissioner has not made a final decision. *See Bass v. Social Security Admin.*, 872 F.2d 832, 833 (9th Cir. 1988) (per curiam).

Here, the Commissioner asserts that plaintiff's SSI application has not been fully processed or adjudicated by SSA and, therefore, it has not rendered a final decision as to that claim. Plaintiff agrees that his original SSI application was never fully processed by SSA and that it was not heard by the ALJ. The Commissioner's memorandum requesting remand indicates "[t]he Commissioner has already taken action to remedy the situation and [p]laintiff's SSI claim is currently being processed in an expedited fashion." Dkt. No. 22 at 7. The Commissioner has not made a "final decision" on plaintiff's SSI application, as contemplated by 42 U.S.C. § 405(g). As a result, this Court lacks subject matter-jurisdiction over plaintiff's SSI application and therefore, that claim must be dismissed. *Bass*, 872 F.2d at 833. However, it is undisputed that the Commissioner did render a final decision regarding plaintiff's application for DIB, and the Court has jurisdiction to review the ALJ's decision to deny plaintiff's application for DIB pursuant to 42 U.S.C. § 405(g)(2005).

IV. STANDARD OF REVIEW

The Court may set aside the Commissioner's denial of social security benefits when the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *See* 42 U.S.C. § 405(g); *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993);

¹ The Ninth Circuit applies a three-part test for determining whether a judicial waiver of § 405(g)'s exhaustion requirement is warranted in a particular case. *Johnson*, 2 F.3d at 921. "The claim must be (1) collateral to a substantive claim of entitlement (collaterality), (2) colorable in its showing that denial of relief will cause irreparable harm (irreparability), and (3) one whose resolution would not serve the purposes of exhaustion (futility)." *Kildare*, 325 F.3d at 1082 (internal quotations and citations omitted). As none of the three elements are present, the Court concludes that a judicial waiver of the exhaustion requirement is not appropriate.

01 *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996). Substantial evidence is defined as more
02 than a mere scintilla, but less than a preponderance; it is such relevant evidence as a reasonable
03 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747,
04 750 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in
05 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
06 Cir. 1995). Where the evidence is susceptible to more than one rational interpretation, it is the
07 Commissioner's conclusion that must be upheld. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th
08 Cir. 2002) (internal citations omitted).

09 V. EVALUATING DISABILITY

10 As the claimant, Mr. Burkett bears the burden of proving that he is disabled within the
11 meaning of the Social Security Act. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999)
12 (internal citations omitted). Disability is defined as the "inability to engage in any substantial
13 gainful activity by reason of any medically determinable physical or mental impairment, which
14 can be expected to result in death, or which has lasted or can be expected to last for a
15 continuous period of not less than twelve months[.]" 42 U.S.C. §§ 423 (d)(1)(A),
16 1382c(a)(3)(A). A claimant is disabled only if his impairments are of such severity that he is
17 not able to do his previous work, and cannot, considering his age, education, and work
18 experience, engage in any other substantial gainful activity existing in the national economy.
19 See 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B); see also *Tackett v. Apfel*, 180 F.3d 1094,
20 1098-99 (9th Cir. 1999). In addition, a claimant applying for DIB must show that he was
21 covered by the social security disability insurance program at the time of the injury's onset or
22 occurrence. See 42 U.S.C. §§ 416(i)(3), 423(c)(1); 20 C.F.R. § 404.130(b).

23 The Social Security Regulations set out a five-step sequential evaluation process for
24 determining whether a claimant is disabled within the meaning of the Social Security Act. See
25 20 C.F.R. §§ 404.1520, 416.920. At step one, the claimant must establish that he is not
26

01 engaging in any substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b). If the
02 claimant establishes that he has not engaged in any substantial gainful activity, the
03 Commissioner proceeds to step two. At step two, the claimant must establish that he has one
04 or more medically severe impairments, or combination of impairments, that limit his physical or
05 mental ability to do basic work activities. If the claimant does not have such impairments, he is
06 not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe
07 impairment, the Commissioner moves to step three to determine whether the impairment meets
08 or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d),
09 416.920(d). A claimant who meets or equals one of the listings for the required twelve-month
10 duration requirement is disabled. *Id.*

11 When the claimant's impairment neither meets nor equals one of the impairments listed
12 in the regulations, the Commissioner must proceed to step four and evaluate the claimant's
13 residual functional capacity ("RFC"). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the
14 Commissioner evaluates the physical and mental demands of the claimant's past relevant work
15 to determine whether the claimant can still perform that work. 20 C.F.R. §§ 404.1520(f),
16 416.920(f). If the claimant is not able to perform his past relevant work, the burden shifts to
17 the Commissioner at step five to show that the claimant can perform some other work that
18 exists in significant numbers in the national economy, taking into consideration the claimant's
19 RFC, age, education, and work experience. 20 C.F.R. §§ 404.1520(g), 416.920(g); *Tackett*,
20 180 F.3d at 1100. If the Commissioner finds the claimant is unable to perform other work,
21 then the claimant is found disabled, and benefits may be awarded.

22 VI. DECISION BELOW

23 On August 21, 2004, the ALJ issued a decision finding:

- 24 1. The claimant meets the nondisability requirements for a period of
25 disability and Disability Insurance Benefits set forth in Section 216(i)
26 of the Social Security Act, but is insured for benefits only through

December 31, 1998.

2. The claimant has not engaged in substantial gainful activity since the alleged onset of disability.
3. The claimant's obesity and sleep apnea are considered "severe" based on the requirements in the Regulations 20 CFR § 404.152(c).
4. These medically determinable impairments do not meet or medically equal one of the listed impairments in Appendix 1, Subpart P, Regulation No. 4.
5. I find that the claimant's allegations regarding his limitations are not totally credible for the reasons set forth in the body of the decision.
6. On and before the date that his insured status expired, the claimant retained the residual functional capacity to lift or carry 20 pounds occasionally and 10 pounds frequently. He could stand or walk for six hours in an eight hour workday. The claimant could sit for six hours in an eight hour workday.
7. The claimant's past relevant work as writer and public information officer do not require the performance of work-related activities precluded by his residual functional capacity (on and before the date that his insured status expired) as they are generally performed in the national economy (20 CFR § 404.1565).
8. The claimant's medically determinable obesity and sleep apnea did not prevent him from performing his past relevant work on or before the date that his insured status expired.
9. The claimant was not under a "disability" as defined in the Social Security Act, on or before the date that his insured status expired on December 31, 1998 (20 CFR § 404.1520(f)).

AR at 35-36.

VII. ISSUE ON APPEAL

The issue on appeal is whether this case should be remanded with instructions to award benefits, as urged by plaintiff, or remanded for further administrative proceedings, as urged by the Commissioner. Plaintiff alleges numerous errors in the ALJ's decision and requests that the Court award him both DIB and SSI benefits. These errors are best summarized as: 1) the ALJ committed reversible error by failing to accord proper deference to the uncontradicted opinions of plaintiff's treating physicians without explaining a specific and legitimate reason for doing so; 2) the ALJ failed to develop the administrative record; and 3) the ALJ erred in finding that

01 plaintiff's subjective reporting of his symptoms and disabilities was not credible. Dkt. No. 16
02 at 9, 12, 14. The Commissioner concedes that there were irregularities in the processing of
03 plaintiff's SSI application and agrees that further proceedings are necessary. Dkt. No. 22 at 6.
04 However, the Commissioner also urges the Court to uphold the ALJ's decision on the DIB
05 claim. *Id.* at 8. The Commissioner does not provide any substantive defense of the ALJ's
06 decision in response to the deficiencies raised by plaintiff. Because the Court does not have
07 subject matter jurisdiction over plaintiff's SSI claim, the only issue presented is whether
08 plaintiff's DIB application should be remanded for an award of benefits or for further
09 administrative proceedings.

10 VIII. DISCUSSION

11 If the Court determines that the ALJ erred, it has discretion to remand for further
12 proceedings or to award benefits. *See Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990).
13 The Court may direct an award of benefits where "the record has been fully developed and
14 further administrative proceedings would serve no useful purpose." *McCartey v. Massanari*,
15 298 F.3d 1072, 1076 (9th Cir. 2002). The Court may credit the evidence before it as true and
16 remand for an award of benefits when:

17 (1) the ALJ has failed to provide legally sufficient reasons for rejecting the
18 claimant's evidence; (2) there are no outstanding issues that must be resolved
19 before a determination of disability can be made; and (3) it is clear from the
record that the ALJ would be required to find the claimant disabled if [s]he
considered the claimant's evidence.

20 *Id.* at 1076-77.

21 Because of the unusual procedural posture of this case and the minimal briefing that
22 was submitted to the Court on the substantive issues regarding the ALJ's decision, this case
23 does not fit neatly within the analytic framework of *McCartey*. Nevertheless, for the reasons
24 explained below, the Court finds plaintiff's DIB claim should be remanded for further
25 administrative proceedings. Concurrent evaluation of both applications will ensure a thorough,
26

01 fair, and efficient determination is made on plaintiff's claims.

02 A. It is Not Clear from the Record that the ALJ Improperly Rejected Plaintiff's
03 Evidence Regarding his DIB Claim.

04 Plaintiff alleges that the ALJ committed multiple errors in evaluating or failing to
05 evaluate his evidence. First, plaintiff argues that the ALJ did not accord the proper degree of
06 deference to the opinions of his treating physicians, Dr. Mary Simonson and Dr. Michael
07 Welsh. Dkt. No. 16 at 12-13. Second, plaintiff argues that the ALJ failed to properly analyze
08 the credibility of his symptom-related testimony. Third, plaintiff claims that the ALJ did not
09 fulfill her duty to develop the record. The Commissioner argues that the ALJ's decision was
10 based on substantial evidence in the record.

11 Regarding plaintiff's first two arguments, there is ample evidence in the record that
12 the ALJ applied the proper standards in her evaluation of plaintiff's evidence. She outlined
13 her analysis and provided explanations as to why she relied on certain evidence and why she
14 rejected other evidence as either unreliable or irrelevant. This is not to say that the Court
15 would have upheld the ALJ's decision if that opportunity had been presented. Rather, the
16 Court merely concludes that the record in this case does not indicate that there was the kind of
17 inexplicable rejection of significant evidence that would mandate a direct award of benefits at
18 this time.

19 The record does, however, demonstrate plaintiff's well-founded concern that the
20 record was not adequately developed. The ALJ rejected one of Dr. Welsh's conclusions
21 about plaintiff's disability status in part because the assessment was not accompanied by an
22 explanation of how the determination was reached. AR 29. To the extent that the ALJ
23 rejected Dr. Welsh's opinion because the basis of it was unknown, the ALJ should have
24 solicited clarification from the doctor. It is incumbent upon an ALJ to obtain additional
25 information from a doctor if the ALJ determines that she needs to know more about the
26

01 doctor's assessment in order to properly evaluate it. *Smolen*, 80 F.3d at 1288 (holding that,
02 where ALJ thought he needed to know the basis of doctor's opinions in order to evaluate
03 them, ALJ had a duty to conduct an appropriate inquiry, for example, by subpoenaing the
04 physicians or submitting further questions to them).

05 B. There are Outstanding Issues that Must be Resolved Before a Disability
06 Determination of Disability Can be Made.

07 The second step for determining whether a case should be remanded for an immediate
08 award of benefits or for further administrative proceedings is to assess whether there are any
09 outstanding issues that must be resolved before a determination of disability can be made.
10 *McCartey*, 298 F.3d at 1076. Given the posture of this case, the Court cannot conclude that
11 there are no outstanding issues. Plaintiff has alleged deficiencies in the ALJ's decision and has
12 complained that the ALJ did not fully develop the record. Dkt. No. 16 at 8, 13. Plaintiff also
13 asserts that certain relevant medical records were improperly left out of the record. *Id.* at 9-10.
14 It is apparent, therefore, that in spite of his desired outcome in this proceeding, plaintiff
15 concedes that there are outstanding issues to be resolved in this case and that further
16 development of the record is warranted

17 Additionally, it is clear from the record and the parties' pleadings that there was
18 considerable confusion involved in processing plaintiff's SSI claim. *See, e.g.*, AR 499-500;
19 Dkt. Nos. 22 at 6-9, 16 at 16. This confusion may have affected the ALJ's decision on
20 plaintiff's DIB application. Because the Commissioner is currently processing plaintiff's SSI
21 application, it is both logical and efficient to remand the DIB matter for further proceedings as
22 well.

23 C. It is Not Clear From the Record that the ALJ Would be Required to Find
24 Plaintiff Disabled if She Considered All of Plaintiff's Evidence.

25 The final step for determining whether a case should be remanded for an immediate
26 award of benefits or for further administrative proceedings requires the Court to assess

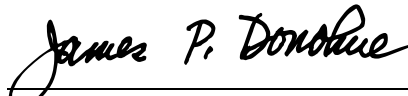
01 whether the ALJ would be obligated to find the claimant disabled if she considered the
02 erroneously-rejected evidence. *McCartey*, 298 F.3d at 1076-77. This prong is closely related
03 to the second prong: if there are outstanding issues, it is unlikely that a clear finding of
04 disability would be required.

05 Plaintiff argues that the Court should find him disabled and award benefits based on the
06 evidence in the record. However, as discussed above, the record in this case was not fully
07 developed at the administrative level. Therefore, the Court cannot determine whether a finding
08 of disability will ultimately be required on remand. Plaintiff should be allowed to have his
09 claims fairly adjudicated after having had the opportunity to present evidence that may have
10 been previously unconsidered. Again, the ambiguity of the record at this time requires
11 remanding this matter for further administrative proceedings.

12 IX. CONCLUSION

13 For the reasons set forth above, the ALJ's decision on plaintiff's DIB application
14 should be reversed, and both the DIB and the SSI claims should be remanded for further
15 administrative proceedings not inconsistent with this report and recommendation. Plaintiff has
16 indicated that he wishes to conduct further discovery. Dkt. No. 26. This matter shall be
17 addressed by the ALJ on remand, as well as those arguments set forth by plaintiff in Section
18 VI of this report and recommendation. A proposed order accompanies this report and
19 recommendation.

20 DATED this 11th day of August, 2006.

21
22 
23 JAMES P. DONOHUE
24 United States Magistrate Judge
25
26